INSURANCE OF LIMITED INTERESTS AGAINST FIRE.

SEVERAL distinct classes of cases of fire insurance on property in which the insured has a limited interest, or an interest less than that of full ownership, have been the occasion of difficulty in determining the amount of recovery under the policy in case of loss; and the purpose of this article is to bring these classes of cases into relation with each other in the hope that some general rule may be found to exist which will either make more satisfactory the conclusions which the courts have reached, or lead to a correction of such results should they be found not to be in harmony.

It may be premised that the difficulty to be overcome in each of these cases is that of applying a general principle which has been assumed in the development of the law of insurance to the effect that insurance is a contract of indemnity. The question is not as to the correctness or value of this general proposition, but rather as to its meaning, and as to whether it applies only in determining what contract of insurance is valid, or whether it is also to control in determining what loss shall be recovered.

The contract of insurance is in its very essence aleatory, in that it involves an element of chance or risk. At a time when wagering contracts were not invalid the contract of insurance entered into by the owner of property was spoken of as a contract for an indemnity as distinguished from a wagering contract, because the general object of the contract was to provide indemnity for a loss rather than to secure the possibility of a mere speculative gain.[1] Before the passage of the statute 19 Geo. II., c. 37

[1] See Lowry *v.* Bourdieu, 2 Doug. 468 (1780), where Lord Mansfield says: "There are two sorts of policies of insurance, mercantile and gaming policies. The first sort are contracts of indemnity and of indemnity only, and from that practice a great variety of decisions and consequences have followed. The second sort may be the same in form, but in them there is no contract of indemnity, because there is no interest upon which a loss can accrue. They are mere games of hazard, like the case of a die." The case was one in which plaintiff sought to recover a premium paid on a policy upon a vessel, the real occasion, however, of taking it being that the captain of the vessel was indebted to the plaintiff, who sought thus to have security for his claim. The majority of the court thought that the contract was in violation of the statute against gaming policies, and the plaintiff ought not to have relief although the insurance was void.

(1746), prohibiting wager policies, it had been usual to stipulate for insurance "interest or no interest," and the courts had no difficulty in allowing recovery in the event of loss, even though the assured was not at all concerned in point of interest in the subject-matter of the insurance.[1] Even after the statute such a policy was good on foreign ships.[2] But before the passage of the statute of Geo. II., some English courts, especially the Court of Chancery, had announced the view that insurance without interest was invalid.[3] In this country the courts were at first in some doubt as to whether they would recognize a wager policy as valid.[4] But it has become well established that even a valued policy is not valid if the insured has no interest.

The cases thus far referred to are cases of marine insurance in which the policy is valued, and therefore the discussion of indemnity had no relation to the amount to be paid, but only to the validity of the contract, depending on whether the insured had an interest. But even under a valued policy of marine insurance the question would arise as to the amount to be paid, in case of partial loss, and in this connection again it was said that such a policy was one of indemnity, and the insured could recover only *pro rata*. But this conclusion was put on the ground that otherwise the parties would be controverting the policy of the statute of Geo. II. prohibiting wager policies.[5]

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[1] Assievedo *v.* Cambridge, 10 Mod. 77 (1712).

[2] Thellusson *v.* Fletcher, 1 Doug. 315 (1780).

[3] Goddart *v.* Garrett, 2 Vern. 269 (1692); Harman *v.* Van Hatton, id. 717 (1716). It is to be noticed that these were cases involving policies in favor of lenders on bottomry. In the first case the bond had become absolute, and the policy was cancelled by the chancellor at the suit of the insurer on the ground that the insured had elected to rely on the vessel, and was not entitled to his policy although the time of the policy had not expired. In the second case the borrower on bottomry asked to have the bond cancelled because the lender had recovered insurance, but this was not allowed.

[4] Pritchet *v.* Insurance Co. of N. Am., 3 Yeates, 458 (1803); Clendining *v.* Church, 3 Caines, 141 (1805); Juheld *v.* Church, 2 Johns. Cas. 333; Buchanan *v.* Ocean Ins. Co., 6 Cow. 319 (1826).

[5] Lewis *v.* Rucker, 2 Burr. 1167 (1761). See also 1 Marshall, Ins. 99, 111. Prior to the statute of Geo. II. the Court of Chancery had compelled the insured in a marine policy to disclose what goods had been put on board and what saved, to determine how much the insurer must pay. Le Pypre *v.* Farr, 2 Vern. 716. And in the same line is the suggestion made in Clendining *v.* Church, 3 Caines, 141, based on some of the English cases, that under a wager policy there should not be a recovery in case of a capture which did not result in loss (for instance, because of a recapture and restoration of the vessel), although capture was within the stipulations of the policy. But in Depaba *v.* Ludlow, Com. 360 (1720), insured was allowed to recover under his policy "interest or no interest, against all enemies, pirates," etc., on account of capture by a

The sense in which insurance was first said to be a contract of indemnity is illustrated by the difficulty with which the courts were confronted in regard to life insurance. At first there seems to have been no distinction taken between an insurance on the life of an individual and insurance on a vessel or goods at sea, and so long as the courts would enforce a wagering contract of insurance, that is, a contract in behalf of one having no interest, there seemed no necessity for making any such distinction. There was no essential reason why persons should not bet on the continuance of a life as well as upon the continuance of the existence of a chattel.[1] But in the famous case of Godsall *v.* Boldero,[2] in the King's Bench, which seems to have been the first case in which the question was definitely considered, Lord Ellenborough announced the doctrine that life insurance was to be looked on as a contract of indemnity, and refused to allow recovery under a policy to one who had taken insurance as creditor, but whose claim had been satisfied before the death of the party whose life was insured. He based this conclusion upon language of Lord Mansfield in regard to partial loss in marine insurance, and stated the broad doctrine that life insurance as well as every other form of insurance is a contract of indemnity as distinct from a contract of gaming or wagering. It was nearly fifty years afterward that Baron Parke in the Exchequer Chamber, in the case of Dalby *v.* India & London Life Assur. Co.,[3] overthrew the theory that life insurance was a contract of indemnity, and pointed out that it was simply a contract to pay a fixed sum of money on the happening of an event certain to occur but uncertain as to time. In that case the distinction

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pirate, although the vessel was retaken after nine days' detention, and was surrendered to insured after suit was brought.

[1] In Viner's Abridgment, under the head of Policy of Insurance, it is said in a note, "Assurances may be made on men's heads as well as ships and goods." And so in Bendir *v.* Oyle, Sty. 166 (1649), and Denoir *v.* Oyle, id. 172 (1649), the question is discussed as to whether the court of the Commissioners of Policy of Assurance could proceed in the trial of the assurance of a man's life, it being insisted that an action of that kind was triable at the common law, and was not by statute brought within the jurisdiction of the special court. The common-law court granted the prohibition, Roll, Chief Justice, answering the argument that the policy was like an ordinary policy of marine insurance, and that the life to be insured might concern merchandising, with a suggestion that "this is a far-fetched construction, and we cannot avoid the granting of the prohibition." It appears from the further statement of the case that the policy was taken on the life of one Captain Parr by persons who had become his bail for a debt in the admiralty court, Parr being part owner of a ship in which he was to make a voyage.

[2] 9 East, 72 (1807).

[3] 15 C. B. 365 (1854).

between fire and marine insurance as involving the necessity of indemnity, and life insurance as not a contract of indemnity, was clearly pointed out. The act of 14 Geo. III., c. 48, forbade life insurance without interest, and limited the amount to the interest; but the court construed this act as applicable only to the inception of the contract and as determining its validity when made, and not as limiting the recovery under a policy which was valid in its inception. This is the rule now universally recognized.[1]

Early fire-insurance cases indicate that the contract is understood to be one of indemnity to the owner of the property, and therefore that if the interest of the insured in the property has ceased he cannot recover for a loss, although within the time covered by the terms of the contract. In the report of Lynch *v.* Dalzel, in the House of Lords,[2] it appears that the insurers urged by way of defence that not only the express words, but the nature and design of the contract, is to limit the recovery to such loss as should be sustained by the insured only, but the decision was simply that after the termination of the insurable interest there could be no recovery. And so in Sadlers' Co. *v.* Badcock,[3] the Lord Chancellor refused a recovery under a policy of fire insurance in behalf of the assignees of the insured, the interest of insured having terminated before the loss. Though both of these cases might be referred to as holding that fire insurance is a contract of indemnity, neither of them decides that indemnity is to be measured by the injury to the person insured.[4]

Although these illustrations indicate that a description of insurance as a contract of indemnity did not mean all that such a statement has, in the later development of the law, been supposed to mean, yet they may perhaps be considered as indicating a general conception of the obligation of the insurer, limiting it in practice, so far as consistent with the express language employed, to an obligation to make good the loss suffered by the insured through

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[1] Connecticut Mut. L. Ins. Co. *v.* Schaefer, 94 U. S. 457; Corson's Appeal, 113 Pa. St. 438.

[2] 3 Brown, P. C. 497 (1729).

[3] 2 Atkyns, 554 (1743).

[4] The same suggestion as is made with reference to the cases last above referred to is applicable to Wilson *v.* Hill, 3 Met. 66, where Chief Justice Shaw speaks of fire insurance as a contract with one having an interest in property to indemnify him against any loss *he may sustain* in case the property is destroyed or damaged by fire. But the real question was as to the right of a subsequent purchaser of the property to recover under a policy issued to his grantor and not assigned.

the destruction of or injury to the property within the terms of the contract. Judges have frequently qualified the expression as to indemnity by saying that the contract is not a perfect contract of indemnity,[1] but the disposition has been very strong to reason out every question arising as to the liability of the insurer on the theory that indemnity only has been contracted for.[2] The Supreme Court of Massachusetts adopted from the first the view that the insurer should pay the stipulated sum on the happening of the event insured against, without regard to whether it was necessary to indemnify the insured or not,[3] and there was certainly nothing inconsistent with this in the English cases which had been decided up to that time. Accordingly the same court has denied to the insurer the right of subjugation to the mortgagee's lien, on payment of the loss to the mortgagee,[4] it being insisted that the insurance by the mortgagee is not an insurance of his debt but an insurance on the property, and that the insurance money is only a return of the premiums paid, the larger sum to be received in the event a loss happens, being fixed in just proportion to the chance that it will not happen and that the premium will have been paid without any return; and the court is not annoyed by the fact that the mortgagee may, by subsequently recovering the mortgage debt, get double satisfaction for his loss. It is needless to cite here cases to the effect that by the great weight of authority the insurance company is entitled to subrogation without any express stipulation to that effect.[5] But courts which have recognized the right of subrogation have nevertheless insisted that the

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[1] See for instance Irving *v.* Manning, 1 H. L. C. 287, 307; Aitchison *v.* Lohre, 4 App. Cas. 755, 761.

[2] See the language used in Castellain *v.* Preston, 11 Q. B. D. 380, especially on pages 386, 388, and 400.

[3] In Strong *v.* Manufacturers' Ins. Co., 10 Pick. 40, it is said that the value of the interest of assured in the property is not material; "if he had an insurable interest at the time the policy was effected, and an interest also at the time of the loss, he is entitled to recover the whole amount of damage to the property not exceeding the sum insured." And in King *v.* State Mut. F. Ins. Co., 7 Cush. 1, Chief Justice Shaw in very vigorous language insists that a mortgagee who has insured for his own benefit and paid the premiums out of his own funds may recover for the loss insured against, and having the same insurable interest at the time of the loss which he had at the time of the contract he is entitled to recover a total loss. The court therefore refused to require the mortgagee to assign his security to the insurance company as a condition precedent to payment of the loss to him by the company.

[4] Suffolk F. Ins. Co. *v.* Boyden, 9 Allen, 123.

[5] See especially, however, Honore *v.* Lamar F. Ins. Co., 51 Ill. 409; Sussex County Mut. Ins. Co. *v.* Woodruff, 26 N. J. L. 541.

insurance is of the property and not of the interest of the insured in the property; that is, that in case of insurance of a mortgagee's interest the insurance is against loss of the property itself and not merely against loss of the mortgage debt.[1] It has probably not been held by any court, however, that a mortgagee insuring the property in his own interest can recover more than the amount of his lien. For instance, if his claim has been reduced by payment to less than the amount of the insurance, there is no authority for his recovering even in case of total loss a larger sum than the amount of his claim. In fact the cases are inconsistent in language rather than in result, for no court denies to the mortgagee recovery to the amount of the loss, provided it does not exceed the extent of his claim or the sum named in the policy, even though he may be required to turn over to the company his security. In other words, the company is not allowed to show that he is not really damaged and that the remaining security is ample. But if in any contingency the loss is or may be to his detriment, he recovers the amount of the loss so far as it may thus possibly be to his detriment, not exceeding, of course, the sum insured.

There is the same general harmony among the cases relating to recovery by vendor and vendee, although these cases also contradict each other in the language used in reaching the result. But inasmuch as the vendee is liable for the balance of the purchase money, no court holds that he is restricted in his recovery to the amount which he has paid;[2] nor is the vendor limited to the mere impairment of his security, but he recovers the full amount which he might possibly lose by the loss of the property, that is, the full amount of the loss not exceeding the money remaining unpaid. The English Court of Appeal has gone further in the enforcement of the doctrine of indemnity in these cases, and has held that while the vendor may recover insurance money to the extent of the unpaid purchase price, yet upon subsequently recovering the purchase price he is bound to return to the insurance company the amount received;[3] and the judges give to the doctrine of indem-

[1] Kernochan *v.* New York Bowery F. Ins. Co., 17 N. Y. 428; Excelsior F. Ins. Co. *v.* Royal F. Ins Co., 55 N. Y. 343.

[2] Tylor *v.* Ætna F. Ins. Co., 12 Wend 507; Ætna F. Ins. Co. *v.* Tyler, 16 Wend. 385; Franklin F. Ins. Co. *v.* Martin, 40 N. J. L. 568.

[3] Castellain *v.* Preston, 11 Q. B. D. (C. A.) 380 (1883). On the hearing of this case in the Queen's Bench (8 Q. B. D. 613), Chitty, J., had taken the view that the doctrine of subrogation was to be somewhat strictly limited to cases where a third party was directly liable to the insured for the same loss which was covered by the policy of insurance.

nity the widest possible application, so that whenever it appears that by receiving or retaining the insurance money the insured is more than indemnified, the insurance company is to be protected to the extent to which the insurance money to be paid or already paid exceeds a full indemnity.

But it must be evident that, however liberal the courts may be in restricting the insured to a full indemnity, they must not adopt a rule of construction which may result in less than indemnity; and if the loss is an uncertain or indefinite one, justice requires that the company shall pay the insurance money, even though it may possibly put the insured in a better position than had no loss occurred, rather than throw upon him the burden of establishing the amount of a loss which is incapable of estimation. A pertinent illustration is that of insurance taken by the husband on premises occupied with the wife as a homestead, the title however being in the wife's name. It is plain that in such a case the husband has an insurable interest, for he has by law the right to occupy during life, — a right of which no act of the wife can deprive him, and a right incapable of any definite estimation in money damages. Therefore, if an insurance company sees fit to insure the premises under a contract with him, it ought to pay the amount of the policy, not exceeding the amount of injury by fire, without regard to the length of time during which the husband's right of occupancy will probably continue.[1] A somewhat analogous case is that of insurance by a tenant of buildings which he has the right to remove, and under such circumstances it has been held that his recovery in case of loss before the end of his term should be based on the value of the building destroyed, estimated in the usual way, and not on the value of the building to the insured, in view of the fact that within a very short time it would have been necessary for him to remove it.[2] And in general the recovery by a tenant is hardly to be limited to his pecuniary loss by the destruction of the building, measured by the extent of the unexpired portion of his term, for the reason "that he insures more than the marketable value of his property, and he loses more than the marketable value

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[1] Merrett *v.* Farmers' Ins. Co., 42 Ia. 11. So a husband who is tenant by curtesy of real property of his wife after issue born may, under a policy of insurance taken on the property in his own name, recover the full amount of the damage to the property, not exceeding the sum insured, without regard to the value of his interest. Franklin M. & F. Ins. Co. *v.* Drake, 2 B. Mon. 47; Trade Ins. Co. *v.* Barracliff, 45 N. J. L. 543.

[2] Laurent *v.* Chatham F. Ins. Co., 1 Hall, 40; s. c. Bennett, F. Ins. Cas. 213.

of his property; he loses the house in which he is living and the beneficial enjoyment of the house, as well as its pecuniary value."[1]

The question as to the measure of recovery under a policy taken by a life tenant has several times been referred to by the English courts, and not uniformly to the same effect. In one case[2] it is suggested, by way of illustration, that where the interests of two persons in the same property are insured in separate policies, if those two interests between them make up the whole of the property, as in the case of a tenant for life and remainderman, each would recover under his policy the value of his own interest, although the language of the policies might indicate an insurance to each of the whole of the property; while in another case it is said, with reference to the same illustration, that it has never been heard suggested that the insurance company could cut down the claim of the tenant for life under his policy by showing that "he was of extreme old age, or suffering from a mortal disease."[3] But again it is doubted whether "if a life tenant, having intended to insure only his life estate, dies within a week after the loss by fire, the court would award his executors the whole of the value of the house."[4] There seems to be no direct adjudication, however, that the life tenant cannot recover for damage to the property to the extent of the sum insured, and there ought to be no doubt of his right to do so; for there is certainly no definite rule by which his recovery can be measured which allows him less. The question as to insurance by life tenant has, however, taken the form in this country of an issue as to whether the reversioner or remainderman is to have any interest in the insurance money recovered by the life tenant. Where the insurance is in any sense for the benefit of the life tenant and the reversioner or remainderman jointly, — as, for instance, where the policy is taken by the owner of the property before his death, and the loss does not occur till after his death and while the premises are in the possession of his widow as life tenant,[5] — the proceeds should be treated as standing in place of the property, and the life tenant should have the use of the fund for life, to be turned over to the reversioner or remainderman on the termina-

[1] Bowen, L. J., in Castellain *v.* Preston, 11 Q. B. D. 380, 400.
[2] North British, etc. Ins. Co. *v.* London, etc. Ins. Co., 5 Ch. D. 569, 583.
[3] Rayner *v.* Preston, 18 Ch. D. (C. A.) 1, 15.
[4] Castellain *v.* Preston, 11 Q. B. D. (C. A.) 380, 401.
[5] Haxall's Ex'rs *v.* Shippen, 10 Leigh, 536.

tion of the life tenancy.[1] In cases where insurance is taken by the life tenant at his own expense and in his own interest, contradictory views have been entertained as to the relation of the parties to the insurance money. On the one hand it is insisted that the life tenant holds the premises in trust for the reversioner or remainderman, and therefore that insurance money, standing to some extent in place of the property, must be accounted for at the termination of the life estate.[2] But this reasoning is far from satisfactory. There seems to be no proper ground for saying that the life tenant occupies a position of trust towards the remainderman, any more than one co-tenant is in a position of trustee toward the other; yet in the cases just cited a distinction of this kind is attempted, the same court having previously held that insurance taken by one tenant in common did not inure in any way to the benefit of his co-tenants.[3] A more reasonable position seems to be that of the Massachusetts court which denies to the remainderman any interest in insurance money under a policy taken by the life tenant in his own right and at his own expense.[4] There would be no difficulty as to the measure of recovery under the doctrine that the life tenant holds the insurance money for the remainderman; but under the Massachusetts decision it might be contended that the life tenant should have only the value of his interest. Evidently, however, as suggested above, there is no measure of the injury done to that interest which can be satisfactorily adopted short of the value of the premises destroyed; for the life tenant ought to have, not merely the market value of the injury to his estate based on life tables, but the amount of insurance which he has paid for, unless that amount clearly exceeds any possible damage which he can suffer by the loss of the property.

Where one holds property as bailee, or under a similar trust relation, he may undoubtedly insure to the extent of the value of the

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[1] In the case just cited it was held that the life tenant had no right to use the money in restoring the building destroyed; but in a later case in the same court, where the loss was a partial one, it was thought that the life tenant had a right to the insurance money for the purpose of making repairs. Brough *v.* Higgin, 2 Gratt. 408. In Welsh *v.* London Assur. Corp., 151 Pa. St. 607, it appeared that the insurance was jointly for the benefit of the remainderman and the life tenant, and it was held that the latter could recover the entire loss, and would become trustee for the remainderman as to the excess of the recovery over the value of the life interest.

[2] Clyburn *v.* Reynolds, 31 S. C. 91; Green *v.* Green (S. C.), 27 S. E. Rep. 952.

[3] Annely *v.* De Saussure, 26 S. C. 497.

[4] Harrison *v.* Pepper, 166 Mass. 288.

property, and recover to the extent of any possible damage which the loss of the property may impose upon him, and, inasmuch as it cannot be determined with reference to property which one person holds possession of for another what his liability might be in every possible event, it would seem that he ought to recover on the basis of the full amount of the loss, unless the extent of his liability has in some way become definite. Even though he is a mere custodian under stipulations exempting him from liability, it would not follow that he could not possibly be liable for the destruction of the goods in his custody by reason of his negligence or that of his servant, and against this negligence he has a right to insure. But the cases of insurance by bailee have not turned on this question. When the bailee has sought to recover under an insurance policy on the basis of the full amount of the loss, the courts have looked ahead to see what will become of the insurance money when it is paid. In their zeal to avoid unjust enrichment on the part of the bailee they have adopted the plan of treating him as taking insurance, not for his own benefit alone, but for the benefit of the owner as well; and on the theory that any excess over the bailee's own loss will be accounted for to the owner, they have allowed him to enforce payment of the full amount of the loss.[1] This class of cases may be distinguished from that of mortgagor and mortgagee and vendor and vendee, in which it is said that the owner of the property shall not have the advantage of insurance taken by one having a lien unless the lien-holder has been under obligation to protect the owner, or has intended to do so, by the fact that in the bailment cases the person having a limited interest holds the property itself, and not a mere lien upon it, and holds that property in trust for the owner; and they are distinguished from the cases of co-tenancy or life tenancy above referred to by the fact that in these cases there is no relation of trust, the rights of the party who takes the insurance not being derived from the party for whose benefit it was sought to apply the proceeds of the insurance.

The bailment cases are made to hinge on the question of authority of the bailee to insure for the benefit of the owner, and it is said that the relation of the parties is such that the bailee, taking a policy on the basis of the full value of the goods, will be presumed to have intended it for the benefit of the bailor so far as not necessary to protect the bailee himself from loss, and there-

[1] California Ins. Co. *v.* Union Compress Co., 133 U. S. 387; Hough *v.* Peoples' F. Ins. Co., 36 Md. 432.

fore that, on adoption by the bailor, even after loss, the policy inures to his benefit.[1] Where the policy covers "property held in trust or on commission," or uses like general designation, such as is employed in floating policies, it is likened to a marine policy "to whom it may concern," and the beneficiary may be left for subsequent determination.[2] Therefore it is wholly immaterial whether there is any liability of the bailee to the owner with reference to the loss of the goods, the insurance not being looked upon merely as a protection to the bailee, but also as taken for the benefit of the owner.[3] If the bailee recovers under the policy, the owner may maintain action against him for the money thus received on account of the owner's goods, and if the policy thus covers goods of different owners in the bailee's possession, they may recover from him proportionally.[4] In view of the interpreta-

[1] Waters *v.* Monarch F. & L. Assur. Co., 5 E. & B. 870; DeForest *v.* Fulton F. Ins. Co., 1 Hall, 84; s. c. 1 Bennett, F. Ins. Cas. 223; Waring *v.* Indemnity F. Ins. Co., 45 N. Y. 606; Ætna Ins. Co. *v.* Jackson, 16 B. Mon. 242. In an action on a marine policy, the English Court of Common Pleas was equally divided on the question whether a consignee could recover more than advances and commissions under a policy taken for himself and others. Ebsworth *v.* Alliance Marine Ins. Co., L. R. 8 C. P. 596.

[2] Lee *v.* Adsit, 37 N. Y. 78; Waters *v.* Monarch F. & L. Assur. Co., 5 E. & B. 870; Fire Ins. Assn. *v.* Merchants & Miners' Transp. Co., 66 Md. 339. If the premiums are charged to the owner, that will be evidence that the policy was taken for the owner's benefit: Miltenberger *v.* Beacom, 9 Pa. St. 198; but the other cases do not suggest that this fact is essential.

[3] Fire Ins. Assn. *v.* Merchants & Miners' Transp. Co., 66 Md. 339; California Ins. Co. *v.* Union Compress Co., 133 U. S. 387; Waring *v.* Indemnity F. Ins. Co., 45 N. Y. 606.

[4] Siter *v.* Morrs, 13 Pa. St. 218; Snow *v.* Carr, 61 Ala. 363. It is of course competent to show that the insurance was taken for the protection of only one class of property, although in terms it might cover other property; thus, if the bailee is under obligation to insure as to certain property, and has no such obligation as to other property, he may insist on applying the insurance to the satisfaction of his loss on his own property and on the property which he was bound to insure, leaving the other unprotected. The right to insure does not necessarily impose the duty to do so. Reitenbach *v.* Johnson, 129 Mass. 316; Lancaster Mills *v.* Merchants' Cotton Press Co., 89 Tenn. 1; Martineau *v.* Kitching, L. R. 7 Q. B. 436. Therefore the bailee may abandon insurance which he has taken covering goods in his possession without liability to the owner in case of a subsequent loss. Stillwell *v.* Staples, 19 N. Y. 401. The bailee of course has the first claim on the insurance money, and has the same lien upon it that he had upon the property: Johnson *v.* Campbell, 120 Mass. 449; and undoubtedly he is entitled to have the insurance money applied in satisfaction of any liability which may exist on his part in connection with the loss of the property; but it seems that if the policy was intended for the protection of all the property in his possession, he must account *pro rata* to owners of property held in trust, and cannot retain the money for the entire satisfaction of loss to his own property. Snow *v.* Carr, 61 Ala. 363.

tion put upon insurance by a bailee, it is evident that such insurance, if ratified by the owner, becomes concurrent with other insurance taken by the owner on the same property, and subject to contribution or prorating, according to the provisions of the policies with reference to such insurance.[1] No doubt where payment in full is made under a policy to the owner, and it appears that he is entitled to the proceeds of insurance taken by the bailee, the insurance company which has paid in full could recover back the amount paid beyond its proportional share of the loss, or have contribution from the other company as the policies may authorize.

A class of cases in which insurance is taken by a stockholder in his own name upon the corporate property would be of interest with reference to the rule of indemnity if that question had been raised, but the controversy seems to have always turned on the question whether the stockholder has an insurable interest, and, so far as appears, he has been allowed to recover the full amount of the loss of the property, without regard to the extent to which his interest may have been affected by such loss.[2]

The rule of indemnity which was first invoked merely to distinguish a wager policy from one based on interest has therefore, it seems, become a rule also for determining the amount of loss to be paid, with the limitation, however, that where the interest of insured is indeterminate, he shall not be denied full indemnity against possible damage from the loss. The insurance company may, by requiring a disclosure of the interest of the insured, and by refusing to insure on the basis of an indeterminate interest, protect itself if it chooses from liability in such cases. Indeed, most of the questions of this kind which have arisen have been practically settled by changes in the language of the customary policy rather than by adjudication of the courts. But if the insurer sees fit to issue a policy based on an indeterminate or contingent interest, there is no reason for so limiting the right of recovery of insured as to deprive him of full protection. The in-

[1] Home Ins. Co. *v.* Baltimore Warehouse Co., 93 U. S. 527.

[2] Riggs *v.* Commercial Mut. Ins. Co., 125 N. Y. 7; Warren *v.* Davenport F. Ins. Co., 31 Ia. 464. In an action on an insurance policy taken by a shareholder in the Atlantic Telegraph Company against loss in the adventure of laying the first Atlantic cable, which was not successfully laid, it was held that the shareholder could recover the full amount of the policy; but the insurance was marine, and therefore the policy was valued, and the question of the damages could not have been in controversy. Wilson *v.* Jones, L. R. 2 Ex. 139.

surer may still have relief by subrogation, or perhaps by recovering back any excess of insurance money over full indemnity, when it appears by subsequent events that the contingent damage has not happened and cannot happen.

Briefly, the obligation to make indemnity may be indicated as follows: —

1. Fire insurance is a contract of indemnity against damages to the insured by reason of loss or injury to the property by fire.

2. The recovery for a loss should not exceed the damage, certain or contingent, which insured has suffered, or may suffer, by reason of the loss.

3. If the interest of the insured is that of ultimate owner, with a limitation in the nature of a lien to secure his indebtedness, he is entitled to full idemnity for loss of, or injury to, the property to the extent of the insurance, for the loss falls upon him. If his interest is that of a lien-holder, his recovery should be for the amount of his lien.

4. In case of a lien-holder, bailee, or other person having a contingent or temporary interest, the doctrine of indemnity leads to subrogation, and perhaps to a right to recover from insured any amount paid beyond the damage which subsequently appears to have been suffered.

5. The right of subrogation is not a primary right of insurer, but arises only as between himself and insured to prevent the ultimate realization by the insured of more than full indemnity.[1]

Emlin McClain.

LAW DEPARTMENT,
STATE UNIVERSITY OF IOWA.

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[1] Thus a contract between mortgagor and mortgagee by which the insurance money is to inure to the benefit of the mortgagor, though this contract is not known to the insurer, will cut off the right of insurer to subrogation to mortgagee's lien. Kernochan *v.* New York Bowery Ins. Co., 17 N. Y. 428. And a contract between bailor and bailee by which the insurance taken by a bailor shall be held as indemnity for the loss for which bailee may be responsible will cut off subrogation to any claim against bailee. Phœnix Ins. Co. *v.* Erie Transp. Co., 117 U. S. 312 (dissenting opinion, 118 U. S. 210); Jackson Co. *v.* Boylston Ins. Co., 139 Mass. 508; Platt *v.* Richmond, Y. R. & C. R. Co., 108 N. Y. 358. But by stipulation in the policy, insurer may prevent any contract by insured which will cut off such right of subrogation. Inman *v.* South Carolina R. Co., 129 U. S. 128; Fayerweather *v.* Phœnix Ins. Co., 118 N. Y. 324. Indeed, concealment of such an existing arrangement might, under some circumstances, be material, and defeat the policy. Tate *v.* Hyslop, 15 Q. B. D. 368. The application of the doctrine of subrogation to prevent double payment for the same loss, even under distinct policies, is illustrated by the case of West of Eng. F. Ins. Co. *v.* Isaacs, 1 Q. B. D. (1897) 226 (C. A.), where it appeared that lessor and lessee of premises had each insur-